United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-1504

Bp/s

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM R. BALOG, ET. AL.,

Appellants.

On Appeal From The United States District Court
For The District Of Connecticut

REPLY BRIEF FOR APPELLANTS WILLIAM R. BALOG, ET AL.

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TABLE OF CONTENTS

CASES CITED

POINT I

THE RECORD DOES NOT SUPPORT THE CONCLUSION THAT FORMER ATTORNEY GENERAL MITCHELL INITIALLY AUTHORIZED THE WIRE TAP APPLICATION.

In its brief, the United States makes the bald and unqualified assertion that "MITCHELL'S initial memorandum to PETERSEN was in fact the authorization for the wire tap application . . ." (See Appellee's Br, 23) This assertion is not supported by the record. In his application to the District Court for wire tap interceptions, Special Attorney JOHN R. TARRANT wrote that "JOHN N. MITCHELL has specifically designated in this proceeding, the Acting Assistant Attorney General . . . HENRY E. PETERSEN, to authorize affiant to make this application for an Order authorizing the interception of wire communications." (199, 208) Attached to the TARRANT application was PETERSEN'S letter authorizing TARRANT to make such application to the District Court. (205) Both the Order of the Court and the above application indicated that the authority to make the application was given by PETERSEN and not by MITCHELL. (197) Moreover, the Government, in response to pre-trial discovery motions which sought the identity of the authorizing official responded that "the Government takes the position that the Order and underlying applications speak for themselves." (747)

As noted in our main brief, it has been held that an Acting Assistant Attorney General cannot be designated under §2516(1) to authorize wire taps. (United States v. Acon, 513 F.2d 513) The issue is then whether or not we are dealing with an authorization by Acting Assistant Attorney General or with a signature on the authorization order placed there by an unqualified person. The Supreme Court has held that misidentification is not enough to suppress the wire tap and the fruits thereof since the authorization itself had been given by a qualified person. (See United States v. Chavez,416, U. S. 562, 94, S.C.t 1849) It is our view that the violation here was not technical and the facial insufficiency of the wire tap application renders it unlawful and suppressible. Thus, we have no quarrel with any of the Circuit Court decisions holding that the Attorney General himself had authorized the applications. In United States v. Robertson, 504 F. 2d 289, 291, the Fifth Circuit found that Attorney General MITCHELL himself had approved the wire tap application. In United States v. John, 508 F, 2d 1134, 1137, the Eighth Circuit found that MITCHELL was the Official who in fact gave the authorization to apply for the Order. In United States v. Schaefer, 510 F.2d 1307, 1310, the Eighth Circuit found that it was Attorney General MITCHELL himself, who had authorized application for the interception Order. In United States v. Vigi, 515 F.2d 290, 293, The Circuit Court made the

determination that the authorization was actually approved by the Attorney General himself and the Court did not reach the issue of whether an Acting Assistant Attorney General had the authority to give such authorization. Likewise, in United States v. Swan, 526 F. 2d 147, 148, the Ninth Circuit found that the Attorney General himself approved the application.

The case at bar is more akin to the situation faced by the District of Columbia Circuit in U. S. v. Mantello, 478 F.2d 671, where the Court suppressed the evidence received on the unlawful intercepts because of the Government's failure to comply with the statute. The Court wrote:

> "Despite affidavits to the contrary presented to the United States District Court in support of an application for an Order authorizing the intercepts, neither Attorney General MITCHELL 'designated' deputy WILL WILSON personally authorized, or indeed had any knowledge of, three (3) of the four (4) intercepts in question." (U. S. v. Mantello, supra, 672)

In arriving at this conclusion, the Court held that the Government's failure to comply with the statute was not "substantial" compliance with the law. In arriving at this conclusion, the Court was mindful of the obvious intent of the clear statutory language:

> "Congress intended to limit the power to authorize the making of

> applications for wire taps to these designated individuals, officials who had been nominated to h. th office and confirmed by the Senate for such office. The Congress deliberately limited the authority of the Attorney General to delegate this responsibility. That limitation on his authority to delegate cannot be circumvented by 'alter ego' rationalization." (U. S. v. Mantello, supra 672; See also U. S. v. Calallero, 503 F.2d 1018; U. S. v. King, 478 F. 2d 494)'

The distinction between the cases cited by the Government and the appellants is obvious - only where it has been found that the authorization itself was given by the Attorney General, has any Court sanctioned Government procedure to be in compliance with the statute. The record herein supports the conclusion that JOHN MITCHELL, then Attorney General and subsequently convicted in the United States District Court for the District of Columbia on several felony counts, including perjury, did not authorize the wire tap applications. Even HENRY PETERSEN himself, in his affidavit did not go so far as to categorically state that MITCHELL himself authorized the application. PETERSEN merely deposes that the request was approved in the office of the Attorney General (210). MITCHELL'S memorandum states that he merely "approved the request for authority to apply for an interception Order" and not that he himself

authorized the application. (207) It is asserted herein that MITCHELL could not have designated an unauthorized person to make such application. Assuming arguendo that this Court does not find that the record supports the conclusion that MITCHELL himself did not authorize the application, we submit that a hearing must be held for determining whether or not MITCHELL himself authorized the wire tap application. The Government takes The position that appellants "have shown no more than a general suspicion about its authenticity." (See Appellee's Br., 25) It is submitted that the record is patently clear that MITCHELL did not authorize the application, but, since the affidavits before the Court are conflicting, more than mere "general suspicion" about their authenticity has been raised. In United States v. Losing, 539 F. 2d 1174, a case cited by the Appellee for the above proposition, the Eighth Circuit actually went much further in prescribing guidelines when evidentiary hearings should be held. The Court wrote:

> "Evidentiary hearings need not be set as a matter of course, but if the moving papers are sufficiently definite, specific, detailed, non conjectural to enable the Court to conclude that contested issues of fact going to the validity of the search are in question, an evidentiary hearing is required." (U.S. v. Losing, supra, 1177)

This fact was also recognized by the Third Circuit

in Acon, when the Court wrote that when the examined affidavits vary, the "aggrieved party may impeach the information submitted by the Government of the approving Court." (See U. S. v. Acon, supra, 517) Accordingly, it is submitted that at the very least an evidentiary hearing musr be held as to whether the former Attorney General, now a convicted felon, initially authorized the wire tap application.

POINT II

THE INTERCEPTION APPLICATION DID NOT ADEQUATELY SHOW THAT TRADITIONAL INVESTIGATIVE TECHNIQUES WERE NOT SUFFICIENT

The purpose of the language in 18 U.S.C. §2518 is to assure that wire tapping is not resorted to in situations where traditional investigative techniques would suffice to expose "crime". (U. S. v. Kahn, 415 U. S. 143, 153, 94 S. Ct. C. t 977, 983) It is submitted that the affidavit submitted by F. B. I. agent STEINKE is woefully lacking in failing to allow the Court to make an intelligent critical determination as to the underlying facts, and in failing to adequately show that other techniques, are impractical and unreasonable under the circumstances. (United States v. Vento, 533 F. 2d 838; United States v. Armocida, 515 F. 2d 29) In determining whether or not the Government has fully explained to the authorization judge, (as required by Vento and Armocida) the basis for their conclusion, the Court must consider all the facts and circumstances. "Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants . . . "(U. S. v. James, 494 F. 2d 1007, 1015 - 1016) Courts

have declared that applications whose sole bases are general declarations and conclusory statements by the affiants will not support authorizations. (U. S. v. Kalustian, 529 F. 2d 585) As noted by the Vento Court:

> "The use of 'boiler plate' and the absence of particulars in request for wire tap authorizations have not been permitted lest wire tapping become established as a routine investigative recourse of law enforcement authorities, contrary to the restrictive intent of Congress." (U. S. v. Vento, supra, 849, 850)

In ascertaining all the circumstances, this court should ask why STEINKE failed to indicate why undercover agents could not be employed to infiltrate the gambling operation. (220-221) There was nothing in the affidavit to advise the issuing judge as to why these alternatives were never employed or even seriously considered. At the very least, an explanation is required. (See U. S. v. Vento, supra, 849) The failure to employ such undercover agents is curcious since STEINKE himself states that NICHOLAS LANESE was interested in recruiting employees for the upcoming football season. The cases cited by the Government on this point are easily distinguishable. In United States v. Hinton, 543 F. 2d 1002, this Court held that the wire tap orders and the validity thereof must be determined under New York State Law, but, that in any event, it was established

that normal investigative techniques would be unavailing since they had complied with the New York Criminal Procedure Law. The New York statute requires that the agents inform the authorizing judicial officer of the nature and progress of the investigation, and of the difficulties inherent in the use of normal law enforcement methods. (U. S. v. Hinton, supra 1011) Furthermore, the Hinton case involved a large scale narcotics ring which was principally orchestrated by an individual who had admittedly become more and more evasive, including the fact that he would change his phone numbers and his phone usage. The District Circuit Court felt that additional co-conspirators were involved who could not be successfully investigated without wire tapping. In the case at bar, the agents activities were not monitored as carefully as that required under New York Law. However, far from the covert operation involved in the Hinton case, the so called LANESE operation was actively recruiting new employees. In U. S. v. Armocida, supra, the Third Circuit held, under its facts that a prior history of physical surveillance, utilization of informants, undercover agents, and other wire tap interceptions had failed to determine the scope of the conspiracy or even to identify the participants. In U. S. v. Schwartz, 535 F. 2d 160, the sole informant was not in a position to supply the police with extensive information concerning a large drug operation, since that informant had not been taken into the

confidence of the conspirators. In the U. S. v. O'Neill, 497 F. 2d 1020, the affidavit described in detail the methods of operation of the gambling conspiracy and was not based on mere conclusory statements. Finally, in U. S. v. Steinberg, 525 F. 2d 1126, there was no known undercover access to the informant's supplier and there was no chance of developing such access because of the covert manner in which the defendant operated. Even with these compelling facts in support of the application, this Court admonished the Government that it would be well advised to include a more detailed factual statement indicating the inadequacy of other investigative techniques. (See U. S. v. Steinberg, supra, 1130)

The STEINKE affidavit is nothing more than a boiler plate description that could apply to any gambling operation whatsoever and is so similar to the affidavit in Kalustian that comparison should be made. The statement by Appellee that the Kalustian case does not reflect the law of any circuit, is patently false. (See Appellee's Br. 28 - 29) The infiltration of the alleged gambling operation proved unsuccessful without electronic surveillance only because the F.B.I. had failed to consider reasonable alternatives. If so much was known about this operation why was it so difficult to obtain search warrants especially when the suspected premises were under observation? Gambling paraphernalia, while usually destructive, is no less

destructive than any other contraband, and if this was such an extensive operation as to fall under the Federal Criminal Statutes, surely some substantial physical evidence could have been obtained as a result of a search warrant. Since there were admittedly three (3) confidential sources who were allegedly employed on the gambling operation why were these sources not granted immunity from prosecution and therefore compelled to testify? These and other questions remain unanswered in the Steinberg affidavit. We submit that a common sense and practical approach to this issue requires a determination that alternative means were given little or no opportunity to succeed. (See U.S. v. Daly, 535 F. 2d 434; U. S. v. Kalustian, supra) It is because the Government failed to even adequately explain its failure to use or consider alternative methods that the affidavit must be deemed woefully inadequate and the Order based on such affidavit must be suppressed.

Respectfully submitted,

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LEINHEARDT & MILLER

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 17 day of ~~XXXX~~ Feb. 1977 deponent served the within Brief upon

Sidney M. Glazer, Esq.

attorney(s) for

Appelleee

in this action, at

U.S. Dept. of Justice
WashingtoN, D.C. 20530

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 17 day
of Feb., 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978